TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

International and Operational Law Practice Note

Non-Governmental Organizations and the Military

Purpose

On 9 December 1998, the Department of Defense (DOD) issued a directive[1] that updated the Department of Defense Law of War Program.[2] This note was originally intended to be published as one in a series of practice notes addressing the meaning of the term "principles"[3] as it exists in both this directive, and the Chairman of the Joint Chiefs of Staff Instruction that implemented the prior version of the Law of War Program.[4] This term appears as follows in the most current version of the Law of War Program:

> 5.3. The Heads of the DOD Components shall:
> 5.3.1. Ensure that the members of their Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the *principles and spirit of the law of war during all other operations*.[5]

The review process related to this note included comments from several prominent Department of the Army international and operational law experts on the proposed "principle." These comments led to a significant discussion within the International and Operational Law Department of The Judge Advocate General's School, U.S. Army (TJAGSA) of both the legitimacy of this proposed principle, and the meaning of the term "principle" in the mandates cited above. Several important aspects of these discussions warrant emphasis. First, all those involved in the review of this note concur that U.S. armed forces are obligated to comply with the principles of the law of war during all military operations, even those that do not involve conflict, and therefore do not trigger application of the law of war. Second, the mandates cited above, while establishing this obligation, do not define the specific law of war rules encompassed by the term "principles." Thus, it is necessary to analyze which law of war rules fall into this category. From the perspective of members of the International and Operational Law Department, this is an especially important task, because it is this Department that confronts the task of teaching judge advocates how this policy should be applied to resolve issues confronted by supported commanders during Military Operations Other Than War (MOOTW). As a result, both faculty members and students in the Judge Advocate Officer Graduate Course have in the past attempted to propose certain fundamental rules from the law of war that should be considered to fall within this definition.

Defining the meaning of the term "principle" is, unfortunately, less likely to result in consensus than identifying the need for such a definition. To illustrate this point, the law of war "principle" proposed in this note generated a good deal of conflicting opinion as to its legitimacy. The purpose of this note, and all notes in the series, is to propose a rule derived from the law of war that falls within the category of "principle," and not to definitively establish the precise definition of that term under the DOD Law of War Program. It is hoped that by generating consideration of possible principles, judge advocates will derive a greater understanding of both the law of war foundations proposed for these principles, and the legal challenges related to the relevant issue that arise during MOOTW. It is within this context that this, and indeed all notes published in this series must be understood: not as a reflection of Department of the Army doctrine or an official position of TJAGSA, but as a proposal to help illuminate the meaning of the mandate that serves as the analytical anchor for resolving the multitude of legal issues related to MOOTW.

Scenario

In Kosovo, Doctors Without Borders (DWOB), a non-governmental organization (NGO) that renders essential medical aid to the local residents, has requested transportation to an area controlled by the military where a number of Kosovars reside. Many of the Kosovars are sick and in need of medical attention.

1. U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (9 Dec. 1998) [hereinafter DOD DIR. 5100.77].

2. *Id.* para. 5.1.

3. *See* International and Operational Law Note, *When Does the Law of War Apply: Analysis of Department of Defense Policy on Application of the Law of War*, ARMY LAW., June 1998, at 17; International and Operational Law Note, *Principle 1: Military Necessity*, ARMY LAW., July 1998, at 72; International and Operational Law Note, *Principle 2: Distinction*, ARMY LAW., Aug. 1998, at 35; International and Operational Law Note, *Principle 3: Endeavor to Prevent or Minimize Harm to Civilians*, ARMY LAW., Oct. 1998, at 54; International and Operational Law Note, *Principle 4: Preventing Unnecessary Suffering*, ARMY LAW., Nov. 1998, at 22; International and Operational Law Note, *Principle 6: Protection of Cultural Property During Expeditionary Operations Other Than War*, ARMY LAW., Mar. 1998, at 25; International and Operational Law Note, *Principle 7: Distinction Part II*, ARMY LAW., June 1999, at 35.

4. CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 5810.01, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM (12 Aug. 1996) [hereinafter CJCS INSTR. 5810.01]. This Instruction also established an obligation for United States Armed Forces to comply with the "principles" of the law of war.

5. DOD DIR. 5100.77, *supra* note 1, para. 5.3.1 (emphasis added).

The military doctors do not have the resources to assist all the residents in the area. The growing fear is that if help is not immediate, Kosovars might start to die. The brigade commander asks his judge advocate what support the brigade is authorized to give DWOB, if any.[6]

Introduction

At first glance, the answer seems simple: help the Kosovars in distress, some of whom might die. But, is it possible that the commander may have a *legal* obligation under international law to provide support to NGOs when the military mission has a humanitarian motivation and is also a MOOTW? A related question is whether, absent a legal obligation, U.S. policy dictates that the commander support NGOs?

This scenario is a classic example of the type of dilemma encountered during the conduct of MOOTW. The scenario involves both legal and policy ramifications. The simple fact is that no easy answers exist to resolve such dilemmas. There is no single clearly identifiable source of legal authority relevant to the resolution of humanitarian type issues arising during MOOTW. Instead, judge advocates must craft resolutions based on a variety of binding and non-binding legal authorities, ranging from core principles of international human rights law to domestic law related to the permissibility of expending federal funds for humanitarian assistance. However, the starting point for analyzing how to resolve such humanitarian type issues encountered during the conduct of MOOTW is, by analogy, to examine the relevant "principles" of the law of war applicable to such operations pursuant to U.S. national policy. However, it must be emphasized that this provides only the starting point for analyzing how to resolve this issue. It does not absolve the judge advocate from considering other sources of authority relevant to the issue, such as U.S. fiscal law.

This note draws an analogy between the issue presented in the scenario and issues related to the treatment of civilians during international armed conflict. It concludes that the situation presented to the notional commander is most closely analogous to situations related to the treatment of civilian populations during armed conflict. A key provision of the Geneva Convention Relative to the Treatment of Civilian Persons in Time of War[7] provides the authority, by analogy, on how to react to the challenge of dealing with NGOs in such a MOOTW environment.

The issue of relief efforts directed toward civilian populations in time of war is addressed in numerous specific articles of the GC.[8] However, in Part I of the GC, entitled "General Provisions,"[9] a general rule is established by Article 10[10] that is to guide military forces in deciding how to deal with impartial humanitarian organizations within their area of operations. While this note, in concert with U.S. policy,[11] should be read to prohibit any intentional U.S. interference with relief efforts which are not justified by mission related factors (such as force protection), it cannot be read to mandate assisting the relief organization.

This note does, however, provide a source of authority to support assisting the NGOs to "undertake [measures for] the protection of civilian persons and for [their] relief."[12] The distinction is subtle, but critical: it highlights the difference between viewing this law of war provision as creating an *obligation* to assist, versus providing an *authority* to assist. Viewing the provision as an authority, instead of an obligation, allows the commander to consider other legal and operational factors in deciding how to respond to the plea for assistance. Thus, the legal advisor could, under the circumstances presented in the scenario, advise the commander that applying the law of war principle in issue would provide a legal justification for assisting DWOB, to the extent that operational conditions permit, if the provision of such assistance could be undertaken in a manner that was consistent with applicable U.S. law.[13]

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6. Although this scenario was written before the beginning of current North Atlantic Treaty Organization (NATO) operations in Kosovo, it is strikingly similar to an actual event documented by an American news crew on 12 June 1999. The report, shown on the American Broadcasting Company (ABC) news program *20/20*, detailed the difficulty encountered by a United Nations humanitarian relief convoy traveling from Albania to Pristina. After being halted, the convoy leader demanded security from a French officer serving with the NATO Kosovo Force. The French officer sought guidance from his command channels via a cellular telephone, but was ultimately unable to provide a solid answer for the convoy leader. The convoy ultimately diverted its course to an old warehouse, without security provided by NATO forces. *See 20/20*: *Kosovo: After the Peace* (ABC television broadcast, June 13, 1999).

7. Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, August 12, 1949, art. 2-3, T.I.A.S. 3365 [hereinafter GC].

8. *See, e.g.*, *id.* arts. 59-63 (establishing rules of civilian relief efforts in occupied territory); *id.* art. 108 (establishing rules of relief efforts on behalf of civilian detainees).

9. *Id.* pt. I.

10. *Id.*

11. *See* DOD DIR. 5100.77, *supra* note 1; CJCS INSTR. 5810.01, *supra* note 4.

12. GC, *supra* note 7, art. 10.

The Law of War

Article 10 of the GC[14] states:

> The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or *any other impartial humanitarian organization* may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of civilian persons and for their relief.[15]

This provision of the Geneva Convention is only triggered when armed conflict of an international nature occurs.[16] Its mandate seems clear: that the provisions of the GC are not to be regarded as the exclusive mechanisms for providing relief in favor of the civilian population, and that other humanitarian endeavors for that purpose should be regarded as generally permissible.

Although this note's scenario is not set in time of international armed conflict, Article 10 potentially provides a baseline principle for dealing with organizations engaged in humanitarian activities on behalf of civilian populations in areas affected by military operations. Article 10, according to the Official Commentary, is intended "to make easier to put into practice" the protection of civilians–individuals not involved as combatants.[17] However, because Article 10 creates a requirement that the humanitarian aid organization be impartial, the commander is entitled to demand assurance that the organization is both humanitarian in purpose, and impartial in the execution of that purpose. According to the Official Commentary to Article 10,[18] the organization "must be concerned with the condition of man, considered solely as a human being . . . ."[19] Furthermore, the organization must be "subject to certain conditions. They must be purely humanitarian in character; that is to say they must be concerned with human beings as such . . . ."[20] As to impartiality, the organization must not be "affected by any political or military consideration."[21] The Official Commentary, however, states that "impartiality does not necessarily mean mathematical equality."[22]

Under Article 10, humanitarian activities are subject to the consent of all the concerned parties to the conflict. According to the Official Commentary, "[T]his condition is obviously harsh but it might almost be said to be self-evident. A belligerent [p]ower can obviously not be obliged to tolerate in its territory activities of any kind by any foreign organization."[23] Because the Convention was drafted to apply to periods of international armed conflict, this self-evident condition is indeed logical. However, translating this particular aspect of the Article to a MOOTW situation requires a careful analysis of why this consent condition was included in the Article. Because the intent of the condition was to acknowledge the pragmatic reality of requiring consent of a belligerent in control of a certain area, the party to which this aspect of the principle is applicable may vary from situation to situation. Quite simply, any party who can essentially veto the presence of the humanitarian organization falls within this definition. Thus, if it is an area where U.S. forces have the ability to dictate who will be permitted to undertake humanitarian activities, the United States is the relevant party. However, if the area of intended relief is under the control of another party related to the situation, the United States may not have the ability to provide the relevant consent. This pragmatic emphasis of the consent requirement is highlighted by the following language from the Official Commentary:

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13. For example, fiscal law constraints cannot be ignored, but are beyond the scope of this note. Similar to aid provided to host nation military or civilian forces, a specific statutory authority permitting the desired assistance to the NGO must be identified prior to providing the requested aid. For example, NGO's are often in need of transportation for relief supplies. Two statutory authorities that specifically address the transport of relief supplies are 10 U.S.C.A. §§ 402, 2551 (West 1999). Section 401(c)(4), often referred to as De Minimis Humanitarian and Civic Assistance, may provide some authority for limited assistance. *See generally* INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA-422, OPERATIONAL LAW HANDBOOK, chs. 11, 28 (2000) [hereinafter OPLAW HANDBOOK] (providing a general discussion of the fiscal law authorities typically relied on by judge advocates in the field).

14. OPLAW HANDBOOK, *supra* note 13, chs. 11, 28.

15. *Id.* (emphasis added).

16. *See id.* art. 2.

17. COMMENTARY ON THE FOURTH GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 97 (Jean S. Pictet et al. eds., 1958) [hereinafter GC COMMENTARY].

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 98.

> The "Parties concerned" must be taken to mean those upon which the possibility of carrying out the action contemplated depends. For example, when consignments of relief are forwarded, it is necessary to obtain the consent not only of the State to which they are being sent, but also of the State from which they come, of the countries through which they pass in transit and, if they have to pass through a blockade, of the Powers which control the blockade.[24]

In the scenario presented in this note, the extent of control over the area of operations by U.S. forces results in the conclusion that it is the United States that is the key consenting party. In such a situation, an ill-conceived rejection of permission to undertake humanitarian relief efforts could be considered a violation of the spirit of the law of war, and therefore potentially a violation of U.S. policy (and potentially other aspects of international law, such as fundamental human rights obligation not to condone inhumane treatment of civilians). Of course, if the local commander makes a good faith judgment that legitimate military considerations preclude the grant of consent, no such violation could exist.

The judge advocate should also be aware that there are other articles of law of war treaties that can be viewed as validating the conclusion that the Article 10 requirement is indeed a fundamental law of war principle. Specifically, the basic concept of not obstructing humanitarian relief efforts is found in both 1977 Protocols I and II to the 1949 Geneva Conventions. In fact, Protocol I goes one step further, and establishes the additional requirement of "facilitating" the provision of such relief. In a section devoted entirely to "Relief In Favour Of The Civilian Population,"[25] Article 70 of Geneva Protocol I, which supplements the law of war applicable to international armed conflict, establishes the following requirement:

> The Parties to the conflict and each High Contracting Party shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided in accordance with this Section, even if such assistance is destined for the civilian population of the adverse Party.[26]

One significant issue that arises from interjecting the term "facilitate" into the rule related to dealing with impartial relief efforts is the meaning of that term. According to the Official Commentary:

> The intention of these words is to avoid any harassment, to reduce formalities as far as possible and dispense with any that are superfluous . . . Thus the obligation imposed here is relative: the passage of the relief consignments should be as rapid as allowed by the circumstances. Obviously the passage is in danger of being difficult across territory or through the airspace of a Party to the conflict, and no one is expected to do the impossible: such a Party must do all it can to facilitate the passage of relief consignments. On the other hand, if it does not consider itself to be in a position to guarantee the safety of a consignment, it should say so clearly so that an alternative solution can be sought . . . .[27]

Interestingly, the provision related to relief efforts found in Geneva Protocol II,[28] which supplements the law of war applicable to internal armed conflict, returns to the original requirement of the GC, and omits the obligation to "facilitate" such endeavors. According to Article 18(2) of that treaty:

> If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.[29]

While the United States is not a party to either of these treaties, there is no indication that the basis for refusal to join them was related to either of these provisions.[30] There is also a strong argument that these provisions are binding on the United States as reflections of customary international law.[31] What is more significant than whether these provisions are technically binding on the United States is the support they lend to the conclusion that complying with the principle established in Article 10

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24. *Id.*

25. 1977 Protocol I Additional to the Geneva Conventions, sec. II, *opened for signature* Dec. 12, 1977, 16 I.L.M. 1391.

26. *Id.* art. 70(2).

27. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 823 (1987) [hereinafter COMMENTARY].

28. 1977 Protocol II Additional to the Geneva Conventions, *opened for signature* Dec. 12, 1977, 16 I.L.M. 1391.

29. *Id*. art. 18.

is a fundamental law of war principle. If so, this principle should transcend periods of "armed conflict" and also apply to MOOTW in accordance with U.S. national policy.[32]

Assuming the Article 10 mandate does amount to such a principle, it is important to establish the extent of the obligation. It seems clear that Article 10, as supplemented by the GP I and II articles cited above, require a commander to avoid unjustified interference with impartial relief efforts. Whether there also exists an express or implied requirement to "facilitate" such efforts is less certain. Although this seems to be the requirement established in GP I, the Commentary suggests that "facilitate" is really defined as streamlining the transit process and avoiding bureaucratic delays in the transit of such supplies. Defining the term in such a way seems compatible with the realities of contemporary military operations, because it is a narrow definition of the term, and does not *mandate* extensive efforts to support the transit and delivery of relief supplies. While such an effort may be consistent with the spirit of this principle of the law of war, it does not appear to be mandated even by the expanded concept reflected in GP I, and therefore remains essentially a policy judgment for the commander confronted with a request for such support.

Even a narrow interpretation of this proposed principle plays an important role in analyzing issues related to treatment of civilians during MOOTW. As evidenced by history, civilians are often injured and killed during war, and suffer great hardships during MOOTW. One of the overarching principles of the law of war since the advent of the Geneva Conventions is protecting civilians and alleviating the suffering of civilian populations.[33] Article 10 and the NGO role it validates are but one prong of an effort to achieve this goal. However, the significance of this prong is that it represents an explicit effort to provide a mechanism for dealing with hardships that could not be anticipated, and therefore provided for specifically in other provisions of the law of war. The following language of the Official Commentary highlights this point:

> There are one hundred and fifty-nine Articles in the Convention which we are studying and it might have been thought that they would provide a solution, based on the experience gained in previous conflicts, for any situation which could arise. No one, however, can foresee what a future war will be like, under what conditions it will be waged and to what needs it will give rise. It is therefore right to leave a door open for any initiative or activity, however unforeseeable today, which may be of real assistance in protecting civilians . . . .
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> . . . Therefore, when everything had been settled by legal means–ordinary and extraordinary–by assigning rights and duties, by obligations laid upon the belligerents and by the mission of the Protecting Powers, a corner was still found for something which no legal text can prescribe, but which is nevertheless one of the most effective means of combating war-namely charity. . . .[34]

While the word "charity" in the quoted text refers to the efforts of humanitarian relief organizations, the theory of Article 10 is that such charity will be meaningless if the armed forces controlling the areas where it is directed unjustifiably impede the effort. Thus, such armed forces should embrace such charitable efforts as beneficial to the interests of humanity because they alleviate the suffering of innocents. The logic of this quotation seems to clearly support the extension of this principle of the law of war to the MOOTW environment described in the scenario at the beginning of this note.

Human Rights Law

Human rights law is the body of law that protects an individual from the state. The law of human rights is distinct from the law of war, in part, because the law of war is triggered only by armed conflict, while human rights law arguably applies at all times. It is the United States position that the vast majority of human rights law protects individuals from the treatment of only their own government, not other governments.[35] Under

30. Abraham D. Sofaer (Legal Advisor, United States Department of State), The Position of the United States on Current Law of War Agreements, Remarks at the Symposium on Humanitarian Law (Jan. 22, 1987), *in* 2 AM. U.J. INT'L. L. & POL'Y 415, 463-66 (1987).

31. *Id.* Additional evidence that these rules should be considered customary international law can be found in the Official Commentary to the 1977 Protocols. In discussion of the GP I article, the Commentary cites several United Nations General Assembly resolutions, passed by unanimous vote, that indicate that "facilitating" humanitarian relief efforts is an obligations that exists during all conflicts, both internal and international. *See* COMMENTARY, *supra* note 27, at 1476 n.5. Facilitating such relief efforts was also cited as a fundamental rule of the law of war by the International Criminal Tribunal for the Former Yugoslavia in the opinion of the Appellate Chamber in the case of Prosecutor v. Dusko Tadic a/k/a "Dule," IT-94-1-AR72, at 61.

32. *See* DOD DIR. 5100.77, *supra* note 1; *see also* CJCS INSTR. 5810.01, *supra* note 4.

33. COMMENTARY, *supra* note 27, at 597-600.

34. GC COMMENTARY, *supra* note 17, at 98-99.

35. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 (1986) [hereinafter RESTATEMENT] ("[A] state is obligated to respect the human rights of persons subject to its jurisdiction.").

this interpretation, U.S. forces deployed to Kosovo are not exposed to many provisions of human rights treaties signed and ratified by the United States. However, the core principle of "humane treatment" is considered by the United States to represent a binding customary international law obligation, which applies everywhere, all the time.[36]

While the United States adheres to a restrictive view of the scope of human rights law obligations, the core provisions of this body of law, sometimes referred to as "fundamental" human rights, are considered by the United States as customary international law, and therefore binding at all times. Most significant of these provisions is the obligations not to "practice, encourage, or condone cruel, inhumane, or degrading treatment."[37] A similar obligation exists under the law of war, as reflected in common Article 3 to the Geneva Conventions. The significance of this law is that an unjustified interference with the DWOB effort to treat the sick might be interpreted by critics of U.S. operations as tantamount to encouraging or condoning cruel, inhumane, and degrading treatment, thus violating customary international law. Furthermore, because the fundamental humanitarian prohibition against cruel, inhumane, and degrading treatment is not only a law of war principle applied as a matter of U.S. policy, but also a fundamental principle of customary human rights law, the imperative of compliance is only heightened.

Because non-interference with humanitarian relief efforts is potentially an offshoot of this "humane treatment" obligation, coalition partners in Kosovo, or any other MOOTW environment, may regard this failure to facilitate humanitarian relief as a violation of international law. Furthermore, because other nations interpret human rights treaty obligations to extend beyond national territory,[38] disregard of more explicit human rights mandates may be regarded as violating international law.[39] Thus, voluntary compliance with the requirement of Article 10 will insulate the command from any assertion that the United States is violating the fundamental human rights of the local population, and provide the command with a compelling argument that such an assertion is unjustified. This is one significant benefit of the U.S. law of war policy, which mandates extension of law of war principles to non-conflict operations.[40]

United States Policy

By instruction, U.S. forces must comply with the "law of war principles during all operations that are categorized as [MOOTW]."[41] This is often referred to as law by analogy.[42] If forces in combat are obligated to do their utmost to respect and protect civilians, then it is essential that forces operating in a MOOTW also take feasible measures to mitigate civilian suffering, so long as those measures are consistent with U.S. law and requirements of the military mission. Based on applying law by analogy, U.S. forces should strive to give civilians the same fundamental respect and protection they would otherwise be entitled to during an armed conflict. Today's operational environments in MOOTW often entail civilian suffering equaling, or even exceeding, the degree of civilian suffering resulting from an armed conflict. Therefore, it is imperative to apply the mandate of Article 10 to MOOTW. In a nutshell, reality dictates that a facet of all military operations in today's world is humanitarian in nature and Article 10, a law of war principle, fosters this humanitarian aim by enhancing the cooperation between U.S. forces and NGOs devoted to impartial relief efforts. At a minimum, the efforts of such NGO's should not be impeded by U.S. forces absent some compelling military justification. This includes anticipating the role of such organizations in the planning process, and establishing effective procedures for dealing with these organizations during mission execution. Furthermore, as a matter of policy, a commander may attempt to take more affirmative measures intended to aid the NGO's in achieving their humanitarian objectives.

Military Mission

During a MOOTW, the real concern for most commanders is how to balance accomplishing a limited mission with the humanitarian needs throughout the area of operations. This often includes the challenge of managing NGO activity in their area of operations, to include preventing interference with the military mission. Concern over how to provide support to NGOs is a secondary concern to mission accomplishment. In a MOOTW, the complex situation on the ground and the number of NGOs in an area might make it difficult for the military to accomplish its mission. Worse yet, a NGO might not like the way the military approaches a particular problem and may take

36. For a discussion on the distinction between treaty and customary international law human rights obligations, see OPLAW HANDBOOK, *supra* note 14, ch. 6.

37. *See* RESTATEMENT, *supra* note 35.

38. *See* Theodore Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT'L. L. 78 (1995).

39. For example, the right to health care is viewed as a "right" under human rights law. The United States does not see this "right" as binding on U.S. forces, but many nations do. If the United States does not assist DWOB in the scenario, then the United States has denied health care to the Kosovars and this is arguably a violation of international law.

40. *See* OPLAW HANDBOOK, *supra* note 13, ch. 7.

41. *See* CJCS INSTR. 5810.01, *supra* note 4.

42. *See* OPLAW HANDBOOK, *supra* note 13, ch. 7.

measures that essentially eviscerate the military's efforts. Compliance with Article 10 does not mean subjugating the military mission to the will of a NGO. A plain reading of Article 10 indicates a negative: it does not allow the military to be an obstacle to NGOs in the absence of military necessity.

In the reality of MOOTWs today, Article 10 should be interpreted to mean that every effort be made to avoid impeding NGO support, which, in turn, means to protect civilians. When a particular type of support to the NGO is no longer possible, the abeyance of support should be for a quantifiable military reason. For example, the NGO is no longer impartial, the NGO is a danger to the force, or the NGO is at cross-purposes with the military mission. United States military objectives should always trump the needs of the NGOs. Article 10 does not mandate a different result. What it does require, in addition to taking no action intended to unjustifiably inhibit the efforts of the humanitarian organization, is a good faith effort on the part of the command to provide support to the NGOs.

As demonstrated, "law by analogy" requires commanders to apply Article 10 principles to MOOTW. Applying these principles to the scenario at the beginning of this note, it is clear that the commander may not unjustifiably interfere with the humanitarian efforts of DWOB. More importantly a commander could justifiably make a good faith effort, in the absence of mission constraints (such as fiscal prohibitions), to give support to DWOB.

Conclusion

As the military's role shifts to MOOTW, the dynamics of what constitutes mission success changes. It is essential, according to our own government, to "empower NGOs" to help innocent civilians caught up in world troubles. While Article 10 cannot be read as creating an obligation to provide assistance to such organization, it does prohibit unjustified interference with the organization, and establishes a basis for adopting a policy of rendering such assistance when doing so is consistent with other requirements of the military mission. Major Maxwell, Major Smidt, Major Corn.

Legal Assistance Practice Notes

Former Spouses Beware: Protecting Yourself Is Not Just A Job for the Courts

Many legal assistance and civilian attorneys routinely advise spouses of service members on divorce actions and strategies. A common topic of discussion involves the former spouses' portion of retirement pay. There are typically two ways to address a former spouses' portion in the divorce decree or property settlement–as a specific dollar amount or as a percentage of the disposable retired pay.[43] Both have advantages and disadvantages. With a specific amount, the former spouse ensures they will receive the amount they are entitled to regardless of the service member's election to waive a portion of their retired pay for Veteran's Administration (VA) disability payments. The disadvantage of specific dollar amounts is that the amount remains the same even though the retired pay increases through annual cost-of-living increases.

Conversely, a specific percentage lets the former spouse benefit from the cost-of-living increase, but can reduce the total amount from which their percentage is determined by the election to waive retired pay in exchange for VA disability pay. Attorneys typically explain both options, let the spouse choose one, and head off to court. However, a recent Kansas case highlights the need for attorneys to reevaluate their advice and recommend both a specific amount and a percentage.

According to the Kansas Court of Appeals in *In re Marriage of Pierce*,[44] the trial court correctly ruled that it was powerless to order a man to reinstate his military pension or to pay to his ex-wife the share awarded her in the divorce after the pension was converted to disability pay.[45] In a surprising opinion, the court stated that the wife should have done more to protect herself from this possibility when she signed the agreement giving her a percentage of the pension.[46]

The husband was retired at the time of the 1993 divorce and already receiving his retired pay.[47] He and his wife had a property settlement that gave the wife 18/20ths of one-half of his retirement benefits.[48] The husband also agreed to name the wife

43. 10 U.S.C.A. § 1408(a)(2)(C) (1999). The Uniformed Services Former Spouses Protection Act (USFSPA) requires that an award of a portion of a member's retired pay as property be expressed in dollars or as a percentage of disposable retired pay. *Id.*

44. 982 P.2d 995 (Kan. Ct. App. 1999). Because the regional reporter citation is not yet paginated, this note will use the following LEXIS citation for pinpoint citations: No. 80,115, 1999 Kan. App. LEXIS 454 (Kan. Ct. App. June 25, 1999).

45. *Id.* at *15-*16.

46. *Id.* at *12.

47. *Id.* at *2. The parties in this case were married to each other twice and divorced twice. This case does not deal with the first marriage or divorce, but only with the second.

48. *Id.* Under the parties' settlement agreement, the wife was awarded, among other things, "eighteen twentieths (18/20ths) of one-half (1/2) of the military retirement benefits of the respondent, pursuant to 10 U.S.C. § 1408. From the amount due the petitioner the Air Force or Defense Accounting Agency shall deduct the cost of the Survivor Benefit Plan of which petitioner is the beneficiary." This language is the only reference to the wife's interest in retirement pay. *Id.* at *2-*3.

as his beneficiary under the Survivor Benefit Plan.[49] Although the agreement set out the percentage the wife was to receive, it did not state any specific amount the wife was to receive or the duration of the payments.[50] The agreement contained nothing prohibiting the husband from making a VA disability election or forcing him to indemnify the wife if he made that election.[51]

After the divorce, the husband converted his retired pay to disability pay.[52] The wife stopped receiving her $600 per month payment.[53] In 1997, the wife asked the court to order the husband to reinstate his retirement pay or pay her what she was entitled to under the agreement had he not elected disability pay.[54] The trial court denied her request, and she appealed.

The court of appeals stated that since the divorce had been final since 1993, the only way to grant relief to the wife would be to modify and change the property settlement agreement.[55] However, because *Mansell v. Mansell*[56] made clear that state trial courts do not control military disability benefits, the trial court could not do indirectly what it could not do directly, that is, order the husband to reinstate his pension or pay a portion of his disability pay to the wife.[57]

Additionally, the court found that the husband did not violate the property settlement agreement because nothing in the agreement prevented him from waiving a portion of his pension.[58] The court stated that the "very unambiguous"[59] settlement agreement just gave the wife a specific portion of the retired pay, and that it "should have been perfectly obvious to anyone in 1993 that if [the husband] waived all of his retirement pay for a VA disability pension, [the wife] would get 18/20ths of one-half of nothing."[60] Because the wife was given the opportunity to protect herself from this very predicament at the time of the divorce, the court found that she had shown no valid reason why she should be allowed to do so now.[61]

Simply put, the court believed that the wife had been awarded an asset that had merely declined in value over the years, and the court did not feel that this was a sufficient basis to reopen the divorce settlement and demand more payments or additional property.[62] Although the court recognized that other state courts had granted relief similar to that sought by the wife,[63] it stated that Kansas state law was inconsistent with the rationale used in these decisions.[64] The court also stated that the

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49. *Id.* at *3.

50. *Id.*

51. *Id.* The court also noted that it was unknown whether the husband "voluntarily waived his retirement pay or whether it was waived by the VA due to his deteriorating physical condition." *Id.* at *4.

52. *Id.* at *4-*5.

53. *Id.* at *5.

54. *Id.* Kansas statute § 60-260(b) requires, in part:

> [T]hat a motion for relief be filed within one year after the judgement takes effect and be grounded in one of the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence by which due diligence could not have been discovered in time to move for a new trial; or (3) fraud, misrepresentation or other misconduct by an adverse party.

KAN. STAT. ANN. § 60-260(b) (1997).

55. *Id.* at *5. The agreement entered into by the parties "could not be amended or modified except by the written agreement and consent of each party hereto." *Id.* at *4.

56. 490 U.S. 581 (1989). *Mansell* makes clear that the state trial courts have no jurisdiction over disability benefits received by a veteran. *Id.*

57. *Pierce*, 1999 Kan. App. LEXIS 454, at *8

58. *Id.*

59. *Id.* at *9.

60. *Id.*

61. *Id.* at *12. The court found that the wife:

> [C]ould have insisted [the husband] agree that he would not convert his retirement funds to disability benefits. She did not do so. She could have provided that in the event the retirement funds were converted to disability benefits that [the husband] would be required to continue to pay her from other assets. She did not do so.

Id.

62. *Id.* at *12-*13.

wife's allegations were insufficient to satisfy a breach of contract action.[65]

One judge dissented, stating that the wife's vested interest in the retired pay was similar to a life estate in property.[66] The dissenting judge also pointed out that although the Uniformed Services Former Spouses Protection Act[67] prohibits a state court from awarding more than fifty percent of a military pension to a former spouse,[68] it allows courts to use other assets to satisfy the former spouse's share of the property.[69]

Although this case may be appealed further, it contains a valuable teaching point for legal assistance attorneys. Including language in a property settlement or divorce decree that awards a former spouse the greater of a specific dollar amount or a percentage of the military retired pay, or requires the retired service member to indemnify the former spouse for the amount of money lost after a VA disability election goes a long way towards ensuring that clients do not suffer the same fate as the wife in *In re Marriage of Pierce*. Major Boehman.

Is It Time To Create Another Suspect Class? Missouri Supreme Court Holds That Divorced Parents Are Not A Suspect Class

Legal assistance attorneys have long guided clients through the minefield of divorce and separation actions. One question that frequently comes up is which parent, if any, bears responsibility for paying for the college education of their children? A majority of states provide for continued child support payments for children under the age of twenty-one or twenty-two years who are pursuing a college or vocational degree.

A recent Missouri case, *Kohring v. Snodgrass*,[70] tested the constitutionality of such a statute. The parents in this case had divorced in 1989,[71] and the mother received custody of the couple's two children.[72] The father was ordered to pay child support, with the payment to increase in 1994.[73] In 1997, when the couple's oldest child–a daughter–applied to and was accepted by the University of Missouri-Columbia, the mother filed a motion compelling the father to pay a portion of the child's college expenses.[74] The father filed a motion to dismiss and a cross motion to terminate child support.[75] The court overruled the father's motions and ordered him to pay eighty percent of his daughter's college expenses.[76]

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63. *Id.* at *13 (citing Dexter v. Dexter, 661 A.2d 171 (Md. Ct. Spec. App. 1995)). The court also noted that several other states would also deny the relief sought by the wife, citing Matter of Marriage of Reinauer, 946 S.W.2d 853 (Tex. App. 1997) and Marriage of Jennings, 958 P.2d 358 (Wash. Ct. App. 1998). In *Dexter*, the wife sued on a breach of contract action. The court found for the wife and awarded damages. *Dexter*, 661 A.2d at 171. In *Pierce*, the Kansas Court of Appeals found that case to be an ordinary action for breach of contract, which had no support in the case before it. *Pierce*, 1999 Kan. App. LEXIS 454, at *13-*14. The Kansas court found nothing to indicate that the husband intentionally breached the settlement agreement and stated further that it did not believe that a "motion filed in a divorce action is or can be construed as an action for breach of contract, at least not as alleged by [the wife] in her motion." *Id.*

64. *Pierce*, 1999 Kan. App. LEXIS 454, at *13.

65. *Id.* at *14.

66. *Id.* at *18 (Green, J., dissenting).

67. 10 U.S.C. § 1408 (1994).

68. *Pierce*, 1999 Kan. App. LEXIS 454, at *19-*20 (Green, J. dissenting).

69. 10 U.S.C. § 1408 (e)(6).

70. Kohring v. Snodgrass, No. 81139, 1999 Mo. LEXIS 52 (Mo. Aug. 24, 1999).

71. *Id.* at *1.

72. *Id.*

73. *Id.* The amount was increased to $900 monthly for the two children.

74. *Id.*

75. *Id.*

76. *Id* at *2. The father was also ordered to pay a portion of the mother's attorney fees.

On appeal the father argued, among other things,[77] that the state statute unconstitutionally established child support awards[78] for college expenses in violation of the equal protection clauses of the United States Constitution and the Missouri Constitution.[79] He also argued that the statute infringed upon his "fundamental right" to decide whether to financially support an adult.[80] The Missouri statute[81] essentially provides that any child enrolled in an institution of higher learning by the October following their graduation from high school, who remains enrolled in at least twelve credit hours per semester, is entitled to continued parental support until completing the degree program or reaching the age of twenty-two, whichever occurs first.

The court noted that the first step in determining whether a statute violates the equal protection clause is to decide whether the challenged statutory classification "operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution."[82]

The father's equal protection argument consisted of two prongs. The first prong was that the statute "burdens a previously unrecognized suspect class of unmarried, divorced, or legally separated parents and imposes on them a monetary obligation [of] funding their children's college education that does not exist for married parents."[83] The court disagreed, noting that a suspect class ordinarily contains a group of persons "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[84] Traditionally, membership in a suspect class is reserved for those persons classified according to gender, race, national origin, and illegitimacy.[85] Not only is one's status as a divorced parent outside any of these criteria, but membership in a suspect class is usually something over which the member has no control, and additional protections are therefore required. The decision to divorce, or at least the decision to marry, which may ultimately lead to divorce, is made voluntarily.

The second prong of the father's argument was that the statute also burdens a different suspect class–illegitimate children and children from broken homes–by "alienating them from the parent required to pay support and subjecting them 'to the regrettable but almost inevitable reality of divided allegiances to their parents.'"[86] The court disagreed, finding that it was the divorce or separation itself that tended to alienate the children from the non-custodial parent. Conversely, the purpose of the statute was to support the child, not burden the children. The court also found that even if the children of broken marriages constituted a suspect class, there was no equal protection violation.[87]

The father also argued that as an unmarried parent, he had a "fundamental right" to decide whether to provide support to an adult child.[88] As he can legally exert no control over his adult daughter, it should be his decision, and not the state's, whether to financially support her. Although conceding that the parent-

77. The father also argued that his daughter failed to comply with the statute's requirements by showing him the courses she was enrolled in, the credits earned, and her grades. The father also appealed the decision ordering him to pay 80% of the college expenses, as well as a portion of the mother's attorney fees. *Id.*

78. MO. REV. STAT. § 452.340.5 (1998).

79. *Kohring*, 1999 Mo. LEXIS 52, at *2.

80. *Id.*

81. In relevant part, Missouri statute § 452.340.5 states:

> If when a child reaches age eighteen, the child is enrolled in and attending a secondary school program of instruction, the parental support obligation shall continue, if the child continues to attend and progresses toward completion of said program, until the child completes such program or reaches age twenty-one, whichever occurs first. If the child is enrolled in an institution of vocational or higher education not later than October first following graduation from a secondary school or completion of a graduation equivalence degree program and so long as the child enrolls for and completes at least twelve hours of credit each semester, not including the summer semester, at an institution of vocational or higher education and achieves grades sufficient to re-enroll at such institution, the parental support obligation shall continue until the child completes his or her education, or until the child reaches the age of twenty-two, whichever occurs first.

MO. REV. STAT. § 452.340.5.

82. *Kohring*, 1999 Mo. LEXIS 53, at *4 (quoting Missourians for Tax Justice Educ. Project v. Holden, 959 S.W.2d 100, 103 (Mo. 1997) (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973)).

83. *Id.* at *5.

84. *Id.* (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)).

85. *Id.* (quoting Call v. Heard, 925 S.W.2d 840, 846-47 (Mo. 1996); State v. Stokely, 842 S.W.2d 77, 79 (Mo. 1992)).

86. *Id.* at *6.

87. *Id.*

child relationship is "an associational right . . . of basic importance in our society,"[89] the court found that a "parent's financial obligations to his or her child are considered merely economic consequences that do not critically affect associational rights."[90] The court also found that because the father's alleged "right" to decide whether to support his adult child involved only economic interests and not his associational rights, the statute was not subject to strict scrutiny.[91]

Once the court found that no suspect classifications were involved and no fundamental rights impinged upon, it turned to whether the statute would meet the constitutionality test by relating to a legitimate state interest.[92] The court agreed with the mother's argument that "the state has a legitimate interest in securing higher education opportunities for children from broken homes,"[93] because those children suffer disadvantages that children of existing marriages do not.[94] The court held that the statute "rationally advance[s] a legitimate state interest by requiring financially capable parents to lend support to their children wishing to pursue higher education."[95] Moreover, the court held that the statute only deals with financial interests.[96] For all of these reasons, the court found no constitutional violation.

From a practical perspective, legal assistance attorneys must ensure that their divorce and separation clients are aware that their support orders and agreements are subject to modification by statutory operation, and that the obligation to provide child support does not necessarily end when the child reaches the age of majority. Major Boehman.

Criminal Law Note

Explanation of the 1999 Amendments to the *Manual for Courts-Martial*

Introduction

This note highlights the changes made to the *MCM* and the impact these amendments may have for military criminal law practitioners. The Appendix to this note contains a copy of the 1999 amendments to the *Manual for Courts-Martial* (*MCM*).[97] Generally, the changes will take effect 1 November 1999.

Qualifications of the Military Judge

The 1999 amendments included a change to Rule for Courts-Martial (R.C.M.) 502(c), dealing with the qualifications of the military judge. Formerly, R.C.M. 502(c) required that a military judge be "a commissioned officer on active duty in the armed forces."[98] Amended R.C.M. 502(c) removes the "on active duty" requirement. This change applies only to cases where arraignment has been completed on or after 1 November 1999. The purpose of this amendment is to enable Reserve Component judges to conduct trials during periods of inactive duty training and inactive duty training travel. Congress established the qualifications for military judges in Article 26, Uniform Code of Military Justice (UCMJ),[99] but did not mandate that military judges be on active duty. The active duty qualification appears to be a "vestigial requirement" from the 1951 and 1969 *MCM*. Deleting the language should "enhance efficiency in the military justice system."[100]

88. *Id.*

89. *Id.* at *7 (quoting M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996)).

90. *Id.* (quoting Rivera v. Minnich, 483 U.S. 574, 580 (1986)).

91. *Id.* at *8.

92. *Id.* (quoting Missourians for Tax Justice Educ. Project v. Holden, 959 S.W.2d 100, 103 (Mo. 1997)).

93. *Id.* at *9.

94. *Id.* (quoting Leahy v. Leahy, 858 S.W.2d 221 (Mo. 1993)).

95. *Id.*

96. *Id.*

97. Executive Order Number 13,140 contains the recent amendments to the *MCM*. *See* Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (1999).

98. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 502(c) (1998) [hereinafter MCM].

99. UCMJ art. 26 (1998).

100. Exec. Order No. 13,140, 64 Fed. Reg. at 55,120.

Remote Live Testimony of a Child

The President created new rules for cases involving child abuse or domestic violence to accommodate child victims and witnesses who may be reluctant or fearful to testify before a court-martial.

A newly-created provision of Military Rule of Evidence (MRE) 611[101] reflects Confrontation Clause case law[102] by establishing procedures that the military judge can employ to permit child victims or witnesses to testify from an area outside of the courtroom. The military judge may employ these procedures upon a finding that a child is unable to testify in open court in the presence of the accused (1) because of fear, (2) because the child would suffer emotional trauma from testifying, (3) because of a mental or other infirmity, or (4) because of conduct by the accused or defense counsel that causes the child to be unable to continue testifying.[103] The analysis to MRE 611(d) clarifies that child witnesses who are not victims can be allowed to testify from a remote location.[104]

If the military judge makes one of the above findings under MRE 611(d)(3), the military judge must permit testimony of the child outside of the presence of the accused. The judge will decide the procedure to take the remote testimony, but the testimony should normally be taken via a two-way closed circuit television system. At a minimum, the judge must follow the procedures under R.C.M. 914(a): (1) the victim or witness shall testify from a remote location; (2) personnel at the remote location is limited to the witness, counsel for each side,[105] equipment operators, and other persons deemed necessary by the military judge;[106] (3) sufficient monitors will be used to ensure that the judge, the accused, the members, the court reporter, and the public can see and hear the testimony; (4) the voice of the military judge will be transmitted into the remote location; and (5) the accused will be allowed private, contemporaneous communication with his counsel.[107]

The 1999 amendments include a new rule, R.C.M. 804(c), which provides for another exception to the general rule in R.C.M. 804(a).[108] Under R.C.M. 804(c), the accused may preclude the use of the procedures under R.C.M. 914(a) if he voluntarily leaves the courtroom during the testimony of the child witness.[109] Rule for Courts-Martial 804(c) permits the accused to go to a remote location where he may view the proceedings. In that situation, two-way closed circuit television will transmit the child's testimony from the courtroom to the accused's location. The accused will also have private, contemporaneous communication with his counsel. The accused's election to leave the courtroom during the child witness's testimony does not otherwise affect the accused's right to be present for the remainder of the trial.

Sentencing

The 1999 changes to R.C.M. 1001(b)(4) arguably expand the types of aggravation evidence that can be admitted during the pre-sentencing phase of trial. The 1999 version of R.C.M. 1001(b)(4) includes the same language as the 1998 version, with the following additions: "In addition, evidence in aggravation may include evidence that the accused intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person."[110] The rule was amended to insure that "hate crime" evidence could be presented to the sentencing authority. It is likely that the language of R.C.M. 1001(b)(4) was already broad enough to allow the government to introduce "hate crime" evidence. The 1998 version of R.C.M. 1001(b)(4)

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101. *Id.* at 55,118.

102. *See* Maryland v. Craig, 497 U.S. 836 (1990); United States v. Longstreath, 45 M.J. 366 (1996); United States v. Anderson, 51 M.J. 145 (1999). *See also* 18 U.S.C.S. § 3509 (LEXIS 1999). In *Craig*, the Supreme Court required trial judges to make three case specific findings before allowing a child victim to testify in the absence of face-to-face confrontation. These findings are: (1) The procedure proposed is necessary to protect the welfare of the child victim, (2) The child victim would be traumatized by the presence of the accused, and (3) The emotional distress would be more than *de minimus*. *Craig*, 497 U.S. at 856.

103. Exec. Order No. 13,140, 64 Fed. Reg. at 55,118.

104. *Id.* at 55,122.

105. This does not include an accused who is representing himself.

106. An example would be an attendant for the child.

107. Exec. Order No. 13,140, 64 Fed. Reg. at 55,116.

108. MCM, *supra* note 98, R.C.M. 804(a), (b). Rule for Courts-Martial 804(a) establishes a general rule that the accused will be present at each session of the court-martial. Rules for Court Martial 804(b) identifies two exceptions to the general rule: when the accused is absent without leave after arraignment, and when the accused is persistently disruptive in court. *See* United States v. Daulton, 45 M.J. 212 (1996) (holding that the accused's rights were violated when he was removed from the courtroom so that a child witness could testify).

109. Exec. Order No. 13,140, 64 Fed. Reg. at 55,115.

110. *Id.* at 55,116.

allowed the government to introduce "aggravating circumstances directly relating to or resulting from the offense of which the accused was found guilty."[111] The motive for a person to commit a crime, especially if the motive is hate, would probably be an aggravating circumstance directly relating to the offense.[112] Any question that might have existed has now been removed by this amendment.

The language of the amendment is taken from section 3A1.1 of the Federal Sentencing Guidelines.[113] Under the Federal Sentencing Guidelines, evidence that a crime was motivated by hate of a particular race, color, religion, national origin, ethnicity, gender, sexual orientation, or disability allows for an upward adjustment in the sentence received by the accused.[114]

Another 1999 amendment in the area of sentencing is deleting R.C.M. 1003(b)(4). This change removes the loss of numbers, lineal position, or seniority as a possible punishment in a court-martial. According to the analysis accompanying the 1999 changes, the punishment was dropped "because of its negligible consequences and the misconception that it was a meaningful punishment."[115]

Capital Cases: Aggravating Factors

The amendment to R.C.M. 1004 adds an additional aggravating factor to the list of those aggravating factors that may warrant the death penalty.[116] The new aggravating factor is the premeditated murder of a person under age fifteen. This factor is now found at R.C.M. 1004(c)(7)(K) and is the final aggravating factor listed with respect to violations of Article 118(1). The number of aggravating factors listed in R.C.M. 1004 is now twenty-four, twelve of which involve premeditated murder. The analysis now accompanying this amendment refers to a desire posited by the Joint Services Committee on military justice and endorsed by the President "to afford greater protection to victims who are especially vulnerable due to their age."[117]

Psychotherapist-Patient Privilege

Military Rule of Evidence 513 establishes a psychotherapist-patient privilege for investigations or proceedings authorized under the UCMJ.[118] Military Rule of Evidence 513 clarifies military law in light of the Supreme Court decision in *Jaffee v. Redmond*.[119] Military Rule of Evidence 513 is not intended to apply to any proceeding other than those authorized under the UCMJ. The rule was based in part on the proposed Federal Rule of Evidence (not adopted) 504 and state rules of evidence. Military Rule of Evidence 513 is not a physician-patient privilege; instead, it is a separate rule based on the social benefit of confidential counseling recognized by *Jaffee*. The armed forces still does not recognize a physician-patient privilege for its members.[120] The exceptions to the new MRE 513 are intended to emphasize that military commanders are to have access to all information and that psychotherapists are to readily provide information necessary for the safety and security of military personnel, operations, installations, and equipment.

New Offense: Reckless Endangerment

The recent changes to the *MCM* created paragraph 100a of part IV, which enumerates reckless endangerment as an offense under Article 134. This addition is based on *United States v. Woods*.[121] As defined by the President, the offense has four elements: (1) the accused engaged in conduct; (2) the conduct was wrongful and reckless or wanton; (3) the conduct was likely to produce death or grievous bodily harm to another person; and (4) under the circumstances, the conduct was prejudicial to good order and discipline or service-discrediting.[122] The para-

111. MCM, *supra* note 98 R.C.M. 1001(b)(4).

112. United States v. Martin, 20 M.J. 227, 232 (C.M.A. 1985).

113. Exec. Order No. 13,140, 64 Fed. Reg. at 55,121.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 55,118.

119. 518 U.S. 1 (1996).

120. *See* MCM, *supra* note 98, MIL. R. EVID. 302, 501 analysis, app. 22, at A22-7, A22-37.

121. 28 M.J. 318 (C.M.A. 1989) (finding that unprotected sexual intercourse with another service member, while HIV-positive and after being counseled that the virus is deadly and can be transmitted sexually, stated an offense under Article 134); Exec. Order No. 13,140, 64 Fed. Reg. at 55,123.

122. Exec. Order No. 13,140, 64 Fed. Reg. at 55,119.

graph also explains to practitioners the offense and provides a model specification. The maximum punishment is a bad-conduct discharge, total forfeitures, and confinement for one year.

The addition of reckless endangerment as an enumerated offense under Article 134 assists the government in prosecuting crimes against people. This offense is unique in that it requires neither specific intent nor consummated harm. The prosecution must prove, however, that the conduct was reckless and *likely* to produce death or grievous bodily harm. This offense is an effort to deter the conduct before injury or death actually occurs. Although the amendment was based on an HIV-related case, the offense may be charged in many different types of cases, such as child neglect. In cases involving the operation of vehicles, aircraft, and vessels, however, Article 111 will probably preempt a charge under Article 134. Major Sitler.

Appendix

EXECUTIVE ORDER

1999 AMENDMENTS TO THE MANUAL
FOR COURTS-MARTIAL, UNITED STATES

By the authority vested in me as President by the Constitution and the laws of the United States of America, including chapter 47 of title 10, United States Code (Uniform Code of Military Justice, 10 U.S.C. 801-946), in order to prescribe amendments to the Manual for Courts-Martial, United States, prescribed by Executive Order 12,473, as amended by Executive Order 12,484, Executive Order 12,550, Executive Order 12,586, Executive Order 12,708, Executive Order 12,767, Executive Order 12,888, Executive Order 12,936, Executive Order 12,960, and Executive Order 13,086, it is hereby ordered as follows:

Section 1. Part II of the Manual for Courts-Martial, United States, is amended as follows:

a. R.C.M. 502(c) is amended to read as follows:

"(c) Qualifications of military judge. A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member. In addition, the military judge of a general court-martial shall be designated for such duties by the Judge Advocate General or the Judge Advocate General's designee, certified to be qualified for duty as a military judge of a general court-martial, and assigned and directly responsible to the Judge Advocate General or the Judge Advocate General's designee. The Secretary concerned may prescribe additional qualifications for military judges in special courts-martial. As used in this subsection "military judge" does not include the president of a special court-martial without a military judge."

b. R.C.M. 804 is amended by redesignating the current subsection (c) as subsection (d) and inserting after subsection (b) the following new subsection (c):

"(c) Voluntary absence for limited purpose of child testimony.

(1) Election by accused. Following a determination by the military judge that remote live testimony of a child is appropriate pursuant to Mil. R. Evid. 611(d)(3), the accused may elect to voluntarily absent himself from the courtroom in order to preclude the use of procedures described in R.C.M. 914a.

(2) Procedure. The accused's absence will be conditional upon his being able to view the witness' testimony from a remote location. Normally, a two-way closed circuit television system will be used to transmit the child's testimony from the courtroom to the accused's location. A one-way closed circuit television system may be used if deemed necessary by the military judge. The accused will also be provided private, contemporaneous communication with his counsel. The procedures described herein shall be employed unless the accused has made a knowing and affirmative waiver of these procedures.

(3) Effect on accused's rights generally. An election by the accused to be absent pursuant to subsection (c)(1) shall not otherwise affect the accused's right to be present at the remainder of the trial in accordance with this rule."

c. The following new rule is inserted after R.C.M. 914:

"Rule 914a. Use of remote live testimony of a child

(a) General procedures. A child shall be allowed to testify out of the presence of the accused after the military judge has determined that the requirements of Mil. R. Evid. 611(d)(3) have been satisfied. The procedure used to take such testimony will be determined by the military judge based upon the exigencies of the situation. However, such testimony should normally be taken via a two-way closed circuit television system. At a minimum, the following procedures shall be observed:

(1) The witness shall testify from a remote location outside the courtroom;

(2) Attendance at the remote location shall be limited to the child, counsel for each side (not including an accused pro se), equipment operators, and other persons, such as an attendant for the child, whose presence is deemed necessary by the military judge;

(3) Sufficient monitors shall be placed in the courtroom to allow viewing and hearing of the testimony by the military judge, the accused, the members, the court reporter and the public;

(4) The voice of the military judge shall be transmitted into the remote location to allow control of the proceedings; and

(5) The accused shall be permitted private, contemporaneous communication with his counsel.

(b) Prohibitions. The procedures described above shall not be used where the accused elects to absent himself from the courtroom pursuant to R.C.M. 804(c)."

d. R.C.M. 1001(b)(4) is amended by inserting the following sentences between the first and second sentences:

"Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense. In addition, evidence in aggravation may include evidence that the accused intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person."

e. R.C.M. 1003(b) is amended:

(1) by striking subsection (4) and

(2) by redesignating subsections (5), (6), (7), (8), (9), (10), and (11) as subsections (4), (5), (6), (7), (8), (9), and (10), respectively.

f. R.C.M. 1004(c)(7) is amended by adding at end the following new subsection:

"(K) The victim of the murder was under 15 years of age."

Section 2. Part III of the Manual for Courts-Martial, United States, is amended as follows:

a. Insert the following new rule after Mil. R. Evid. 512:

"Rule 513. Psychotherapist-patient privilege

(a) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

(b) Definitions. As used in this rule of evidence:

(1) A "patient" is a person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition.

(2) A "psychotherapist" is a psychiatrist, clinical psychologist, or clinical social worker who is licensed in any state, territory, possession, the District of Columbia or Puerto Rico to perform professional services as such, or who holds credentials to provide such services from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials.

(3) An "assistant to a psychotherapist" is a person directed by or assigned to assist a psychotherapist in providing professional services, or is reasonably believed by the patient to be such.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication.

(5) "Evidence of a patient's records or communications" is testimony of a psychotherapist, or assistant to the same, or patient records that pertain to communications by a patient to a psychotherapist, or assistant to the same for the purposes of diagnosis or treatment of the patient's mental or emotional condition.

(c) Who may claim the privilege. The privilege may be claimed by the patient or the guardian or conservator of the patient. A person who may claim the privilege may authorize trial counsel or defense counsel to claim the privilege on his or her behalf. The psychotherapist or assistant to the psycho-therapist who received the communication may claim the privilege on behalf of the patient. The authority of such a psychotherapist, assistant, guardian, or conservator to so assert the privilege is presumed in the absence of evidence to the contrary.

(d) Exceptions. There is no privilege under this rule:

(1) when the patient is dead;

(2) when the communication is evidence of spouse abuse, child abuse, or neglect or in a proceeding in which one spouse is charged with a crime against the person of the other spouse or a child of either spouse;

(3) when federal law, state law, or service regulation imposes a duty to report information contained in a communication;

(4) when a psychotherapist or assistant to a psychotherapist believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;

(5) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;

(6) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission;

(7) when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or Mil. R. Evid. 302. In such situations, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice; or

(8) when admission or disclosure of a communication is constitutionally required.

(e) Procedure to determine admissibility of patient records or communications.

(1) In any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party shall:

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party, the military judge and, if practical, notify the patient or the patient's guardian, conservator, or representative that the motion has been filed and that the patient has an opportunity to be heard as set forth in subparagraph (e)(2).

(2) Before ordering the production or admission of evidence of a patient's records or communication, the military judge shall conduct a hearing. Upon the motion of counsel for either party and upon good cause shown, the military judge may order the hearing closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient shall be afforded a reasonable opportunity to attend the hearing and be heard at the patient's own expense unless the patient has been otherwise subpoenaed or ordered to appear at the hearing. However, the proceedings shall not be unduly delayed for this purpose. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members.

(3) The military judge shall examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the motion.

(4) To prevent unnecessary disclosure of evidence of a patient's records or communications, the military judge may issue protective orders or may admit only portions of the evidence.

(5) The motion, related papers, and the record of the hearing shall be sealed and shall remain under seal unless the military judge or an appellate court orders otherwise."

b. Mil. R. Evid. 611 is amended by inserting the following new subsection at the end:

"(d) Remote live testimony of a child.

(1) In a case involving abuse of a child or domestic violence, the military judge shall, subject to the requirements of subsection (3) of this rule, allow a child victim or witness to testify from an area outside the courtroom as prescribed in R.C.M. 914A.

(2) The term "child" means a person who is under the age of 16 at the time of his or her testimony. The term "abuse of a child" means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child. The term "exploitation" means child pornography or child prostitution. The term "negligent treatment" means the failure to provide, for reasons other than poverty, adequate food, clothing, shelter, or medical care so as to endanger seriously the physical health of the child. The term "domestic violence" means an offense that has as an element the use, attempted use, or threatened use of physical force against a person and is committed by a current or former spouse, parent, or guardian of the victim; by a person with whom the victim shares a child in common; by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian; or by a person similarly situated to a spouse, parent, or guardian of the victim.

(3) Remote live testimony will be used only where the military judge makes a finding on the record that a child is unable to testify in open court in the presence of the accused, for any of the following reasons:

(A) The child is unable to testify because of fear;

(B) There is substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying;

(C) The child suffers from a mental or other infirmity; or

(D) Conduct by an accused or defense counsel causes the child to be unable to continue testifying.

(4) Remote live testimony of a child shall not be utilized where the accused elects to absent himself from the courtroom in accordance with R.C.M. 804(c)."

Section 3. Part IV of the Manual for Courts-Martial, United States, is amended as follows:

a. Insert the following new paragraph after paragraph 100:

"100a. Article 134: (Reckless endangerment)

a. Text. See paragraph 60.

b. Elements.

(1) That the accused did engage in conduct;

(2) That the conduct was wrongful and reckless or wanton;

(3) That the conduct was likely to produce death or grievous bodily harm to another person; and

(4) That under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. Explanation.

(1) In general. This offense is intended to prohibit and therefore deter reckless or wanton conduct that wrongfully creates a substantial risk of death or serious injury to others.

(2) Wrongfulness. Conduct is wrongful when it is without legal justification or excuse.

(3) Recklessness. "Reckless" conduct is conduct that exhibits a culpable disregard of foreseeable consequences to others from the act or omission involved. The accused need not intentionally cause a resulting harm or know that his conduct is substantially certain to cause that result. The ultimate question is whether, under all the circumstances, the accused's conduct was of that heedless nature that made it actually or imminently dangerous to the rights or safety of others.

(4) Wantonness. "Wanton" includes "reckless," but may connote willfulness, or a disregard of probable consequences, and thus describe a more aggravated offense.

(5) Likely to produce. When the natural or probable consequence of particular conduct would be death or grievous bodily harm, it may be inferred that the conduct is "likely" to produce that result. See paragraph 54c(4)(a)(ii).

(6) Grievous bodily harm. "Grievous bodily harm" means serious bodily injury. It does not include minor injuries, such as a black eye or a bloody nose, but does include fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other serious bodily injuries.

(7) Death or injury not required. It is not necessary that death or grievous bodily harm be actually inflicted to prove reckless endangerment.

d. Lesser included offenses. None.

e. Maximum punishment. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

f. Sample specification. In that _____ (personal jurisdiction data), did, (at/on board–location)(subject-matter jurisdiction data, if required), on or about _____ 19__, wrongfully and recklessly engage in conduct, to wit: (he/she)(describe conduct) and that the accused's conduct was likely to cause death or serious bodily harm to _____."

Section 4. These amendments shall take effect on 1 November 1999, subject to the following:

a. The amendments made to Military Rule of Evidence 611, shall apply only in cases in which arraignment has been completed on or after 1 November 1999.

b. Military Rule of Evidence 513 shall only apply to communications made after 1 November 1999.

c. The amendments made to Rules for Courts-Martial 502, 804, and 914A shall only apply in cases in which arraignment has been completed on or after 1 November 1999.

d. The amendments made to Rules for Courts-Martial 1001(b)(4) and 1004(c)(7) shall only apply to offenses committed after 1 November 1999.

e. Nothing in these amendments shall be construed to make punishable any act done or omitted prior to 1 November 1999, which was not punishable when done or omitted.

f. The maximum punishment for an offense committed prior to 1 November 1999, shall not exceed the applicable maximum in effect at the time of the commission of such offense.

g. Nothing in these amendments shall be construed to invalidate any nonjudicial punishment proceeding, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action begun prior to 1 November 1999, and any such nonjudicial punishment, restraint, investigation, referral of charges, trial, or other action may proceed in the same manner and with the same effect as if these amendments had not been prescribed.

WILLIAM J. CLINTON

THE WHITE HOUSE,
October 6, 1999.